No. 249.

Brf. of Comstock for Appellees

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Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES,
Appellant,
vs.
AUSTIN, NICHOLS & CO.,
Appellees.
No. 249.

Original

Brief for the Appellees.

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BRIEF FOR THE APPELLEES.

The question certified by the Circuit Court of Appeals being simply: *whether or not certain filled bottles should, under the tariff laws in force in 1896, be added to the value of their contents to make up the dutiable value of the latter*, it is conceived that this court will be content to answer that question only, without proceeding to instruct upon points as to which the court below has not certified, and hence probably does not entertain, any doubts. In that view, much of the brief for the Appellant is believed to be irrelevant, but will be answered because made.

Section 19, Administrative Act.

On the precise question certified, I think the answer must be *negative*, for several ample reasons, viz.:

1. Coverings of dutiable merchandise are not, *prima facie*, dutiable, but are free. It requires no statutory exemption to make them (or anything else) free,

but only on distinct provisions of law do they become dutiable. When merchandise is made dutiable according to its value, it is no sounder a *prima facie* assumption that its value is to be reckoned to include that of its coverings, then that a weight duty should be reckoned on the gross weight of goods and coverings.

Oberteuffer vs. Robertson, 116 U. S., 499.
Karthaus vs. Frick, Taney, 94.

The inclusion of coverings in reckoning value is purely a matter of statutory enactment. The opposite conception seems to pervade Appellant's brief, for on pages 6, 9 it is suggested that specific exemptions may make certain filled bottles free; that the form of the statute accounts for the claim that some of them are free, etc.

2. The only statutory provision existing in 1896, and warranting any assessment of duty on the coverings of merchandise, as such, was the "Customs Administrative" law of June 10, 1890, which required that *ad valorem* duties should be calculated on a valuation of merchandise including its coverings.

3. This statute did not refer to nor include *glass bottles* as such coverings, for when it was enacted, filled bottles were already the subject of express provisions of law for their taxation, in all sizes and qualities, in all conditions of fulness and emptiness, and whatever the nature of their contents, when full (Par. 133, 134, 136, Tariff act of 1883). These provisions the Administrative act did not purport to repeal or supersede, but they were afterward superseded by the Tariff act of October 1, 1890, which contained equally full and precise enactments as to the duty on all filled (and on empty) glass bottles (Par. 103, 104). In view of this continuity of special provisions, and of the very long existence of the same system (at least from 1861 to the present), in continuous operation

side by side with the successive provisions for the exaction of duty on the coverings of *ad volorem* goods (pp. 8,9, Appellant's brief), it is impossible to hold that *filled bottles* ever were, or could have been, subject to the operation of these latter provisions, or specifically to that of Section 19 of the act of June 10, 1890. With entire confidence it may be stated that until after the Tariff act of 1894, executive practice never treated them as so subject, but they were steadfastly recognized and assessed with duty under the provisions for filled bottles in paragraphs 103-04, Act of 1890, and when this was challenged by importers the Government successfully defended the practice in the courts.

Marine vs. Packham, 52 Fed. Rep., 579 (C. C. A.).
In re Salomon, 55 Fed. Rep., 285.

When the Tariff act of 1894 took effect, its provisions for duty on filled bottles were found very incomplete, and the Government to some extent resorted to the practice of assessing duty on them under Section 19 of the Administrative act of 1890. But this practice was repeatedly declared illegal by the courts. In

U. S. vs. Dickson, 73 Fed. Rep., 195 (C. C. A.),

the court clearly ruled that Sec. 19 had no reference to glass bottles as coverings, for the reasons hereinabove stated, and therefore could not be resorted to when, for any reason, duty could not be charged on filled bottles under other provisions. In

Smith vs. U. S., 91 Fed. Rep., 757,

it was again asserted that filled glass bottles could not be subjected to Section 19, but that glass jars, not being bottles, could be. In

Merck vs. U. S., 99 Fed. Rep., 432,

it was for the third time decided that Section 19 was not applicable to filled glass bottles imported under the Tariff act of 1894.

Manifestly, even without these rulings, a law enacted in 1890, and taking effect in that year, during the life of a Tariff act which fully provided for all filled bottles and which it did not repeal, could not be extended to affect such bottles four or six years later, and after the entire life of an intervening Tariff which also fully provided for them, merely by an omission in a still later law, whereby certain sizes of filled bottles were left unprovided for.

It is true that in the Dickson case, as pointed out on page 6 of Appellant's brief, the appellate court asserted that bottles may ordinarily be considered and treated as coverings. But the decision at once proceeded to assert that, in view of the course of legislation, they were not a sort of coverings to which the administrative act could be held applicable. Appellant's counsel, on page 7, brief, inadvertently misstates the reasoning of this Dickson case. It did not hold, "in effect, that to add the value of the bottles to the value of the goods, under Section 19, was assessing an additional duty in the face of the prohibition in paragraph 248." It *might* have so held, and thus disposed of the case, and its very importance is that the court chose other reasoning. It held that neither additional *nor any other* duty could be assessed under Section 19, *because the coverings were glass bottles, and hence not within the operation of Section 19 at all.* Of course, the impotency of the section affects as well its reference to "expenses incident to placing the merchandise in condition," etc., as any other part, and this disposes of the suggestion at foot of page 7 of the opposing brief.

Hence, it seems evident that whatever may have been the dutiable or free character of the small filled bottles herein involved, they were in no event subject to Section 19, and the referred question **must therefore be answered in the negative.**

Paragraph 88, Act of 1894.

But the Appellant seeks to go beyond the question, and to have this court instruct that below, on the entire subject of the tariff character under the laws in force in 1896, of small glass bottles, under one pint capacity, imported filled with merchandise subject to *ad valorem* duties. Reiterating that this, as I contend, is not a labor devolved on this court, and should not be gratuitously undertaken, I think that if it be undertaken, the court must then conclude, as did the circuit court, that no duty was leviable on such bottles. To this conclusion I am guided as follows:

1. Duties are not to be exacted on a doubtful condition of the law.

U. S. vs. Wigglesworth, 2 Story, 369.

(And see Appellants' brief, p. 14.)

2. Duties are not leviable on coverings on general principles, but only by express enactment.

Cases and argument, *supra.*

3. The act of 1894 was not one "recognizing in large measure the protective principle" (Appellant's Brief, p. 14), but was notoriously a low tariff, aimed rather for revenue than for protection (see its title).

4. Its provision as to bottles (and similar glassware, Par. 88) clearly did not provide for assessing duty on small ones, imported as coverings or containers. On the reasons for this there is no light; whether it was a *casus omissus*, or whether pursuant to the congressional intent, but on the plain meaning of its words, and on their repeated judicial construction, the law laid the duty on large bottles both as coverings (when filled)

and as merchandise (when empty), but on small ones only as merchandise (see 91-757).

Grace vs. Collector, 79 Fed. Rep., 315 (C. C. A.).
U. S. vs. Ross, 91 Fed. Rep., 108 (C. C. A.).
Smith vs. U. S., 91 Fed. Rep., 757.
U. S. vs. Merck, 99 Fed. Rep., 433.

The Merck case is especially pointed out, because it determined, in 1899, the precise controversy now here, and was duly acquiesced in on the advice of the Attorney-General, on January 16, 1900. The comments found on page 13 of Appellant's brief, as to this decision and acquiescence, are somewhat disappointing. I had hoped that at least one result of the present certificate would be a clear exposition from the Attorney-General's office as to why the Merck decision was accepted, yet that in the present case appealed. But nothing better is offered than vague conjectures as to what such course may have quite possibly intended, with a suggestion that the purport of the ruling was doubtful, which a perusal of it scarcely bears out. Despite these decisions, the Appellant contends (pp. 12, 13, brief) that the final clause of Par. 88 may be taken to provide a duty of 40 per cent. on small filled bottles. Manifestly, if so, that duty would apply as well on such bottles when their contents were free, or dutiable at specific rates, as when dutiable *ad valorem*. Yet Appellant concedes that in these conditions small filled bottles were not dutiable under Par. 88 (brief, p. 7). And his contention, on page 14, that filled bottles have always been somehow dutiable, "unless the exception in the act was clear and specific," amounts substantially to a concession of all I maintain, for the exception in Par. 88 to provide any duty for small filled bottles is very clear under the rule, "*expressio uniis est exceptio alterius.*" The argument on page 15 develops this same view, for the very point on which this issue is raised and was sustained by the circuit court, is that in the Act of 1894 Congress departed

from its time-honored course of fully providing for all filled bottles, and by wholly omitting to provide for the small ones, made it illegal to exact duty on them.

Even were these rulings less numerous or less manifestly right, it would be deplorable to vitiate them now, for they were severally accepted by all concerned (Appellant's brief, pp. 7, 11, 13), and in their light the Act of 1894 was applied until succeeded by that of 1897.

Under these circumstances the attempt of the Appellant to resort to the alleged *joint* effect of Section 19, Administrative act, and Paragraph 88 of the Tariff of 1894, while readily understood, cannot avail.

It will not do for the Government to occupy the attitude of asserting that Section 19 provides for the bottles because Paragraph 88 does not, but that Paragraph 88 provides for them because Section 19 does not.

Each provision must be scrutinized by itself, to learn whether it applies, and so scrutinized, neither is found applicable to the bottles in suit. Hence there was no provision for their assessment, and they were entitled to be entered free.

No argument for imposition of a duty on these bottles of less than one pint capacity, filled with various merchandise, can be derived or inferred from the prohibition against a duty on bottles filled with ginger ale (Par. 248), for said prohibition may well have been intended to prevent the exaction on such bottles of over one pint, which I fully concede would otherwise be dutiable, filled or empty.

The Form of the Protest.

The evil of inviting this court to assume labors not devolving on it, is well illustrated in this case by Appellant's contention (pp. 2, 3, Brief), that the Board of Ap-

praisers was warranted, under the protest, in deciding that the bottles in suit should be reliquidated at 40 per cent. The brief insists that this rate was one of, those alternatively claimed on the bottles in suit. It is hardly thought that this court will care to consider that question, yet should it do so, the facts are plain. The importer's right to protest only so far as he chooses, is indisputable. And in this case he chose to stand for 40 per cent. duty only on "such of said articles as have been assessed with a duty amounting to more than 40 per cent. *ad valorem*," and plainly so restricted his protest *(vide* Appellant's brief, p. 2). As to *such* only, did he claim that if *(they)* were not free, or dutiable as aforesaid (*i. e.*, at various lower rates), *they* were dutiable only at 40 per cent., etc. When the Board, ruling on this protest, directed the Collector to reliquidate at 40 per cent. bottles which had been assessed with a *less* amount, it plainly exceeded its powers and passed upon an issue not before it. And the Appellant now asks this court to do likewise. No part of the importers' claims was sustained by the Board, and Appellant's suggestions of a query as to their right to appeal is therefore without foundation.

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